

1421147 (Migration) [2015] AATA 3848 (7 December 2015)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Kamaldeep Singh

CASE NUMBER: 1421147

DIBP REFERENCE(S): CLF2011/75263

MEMBER: Margie Bourke

DATE: 7 December 2015

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.221(2)(c) of Schedule 2 to the Regulations.

•

•

•

•

•

•

Statement made on 07 December 2015 at 4:02pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 10 December 2014 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 13 May 2011 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.801.221.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221(2) because the delegate was not satisfied that the applicant met the definition of spouse or de facto partner and was not in a genuine spousal or de facto relationship with the sponsor.
4. The applicant appeared before the Tribunal on 7 December 2015 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, the applicant's mother and the sponsor's mother.
5. The applicant was represented in relation to the review by his registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is in a spousal relationship with the sponsor at the time of decision.

SPOUSE/DEFACTO (cl.801.221(2))

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

8. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. Based on the sponsor's Victorian birth certificate, the Tribunal is satisfied the sponsor is an Australian citizen by birth. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together,

or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The Tribunal has considered the marriage certificate and the evidence of the parties. The Tribunal has noted that there is an error in the spelling of the surname of the sponsor on the marriage certificate. , The Tribunal has considered that the certificate of marriage provided is a registered marriage certificate. Based on the evidence before it, the Tribunal is satisfied that the parties were married on 2 August 2010 in Melbourne. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

11. The Tribunal has considered the evidence of the applicant's mother and the sponsor's mother at the hearing. The Tribunal is satisfied that the applicant's mother arrived from India on 17 June 2015 and has resided with the applicant and sponsor since that date. The Tribunal is satisfied that the applicant's mother is due to return to India on 10 December 2015. The Tribunal is satisfied that the sponsor's mother has known the parties have been in a relationship since 2010 although she has only known they have been married for about six months. The Tribunal is satisfied that both these witnesses believe that the applicant and sponsor are in a genuine and continuing relationship, and have a mutual commitment to each other and the relationship.
12. Further, based on the oral evidence of all four witnesses, the physical presence of the baby in the hearing and the documentary evidence of the hospital administration birth records and the application to register and name the baby, the Tribunal is satisfied that the applicant and sponsor had a baby son born by caesarean section on 10 October 2015 at Sandringham Hospital. The Tribunal accepts that the birth certificate was not available due to a difficulty in relation to the surname of the applicant 'Nagra' which is not on his identification papers but which he wants to have on his son's identification documents.
13. The Tribunal has considered the matters recorded in the Department's decision record dated 10 December 2014. The Tribunal is satisfied that the evidence before it in the hearing of 7 December 2015 was consistent and that the evidence before it conclusively demonstrated that the parties were in a genuine spousal relationship at the time of the Tribunal's decision.
14. The Tribunal is satisfied based on the oral and written evidence before it that the applicant is the sole financial provider for the family. The applicant and sponsor gave consistent evidence in relation to the applicant's weekly earnings, that he took overtime work on the weekends when it was offered, of their debts which included one loan in the sponsor's name and large credit card debts in the applicant's name, their monthly rental commitment and the 50% contribution to their rent provided by the boarder. The applicant and sponsor gave consistent evidence in relation to their shared use of their bank accounts and bank cards, and that the applicant assumed the management for the payment of their financial commitments. The Tribunal is satisfied that the parties share their day-to-day household expenses, and the parties accept they have a joint responsibility for their liabilities. The evidence of the financial aspects of the relationship at time of decision is evidence that the parties are in a genuine and continuing relationship.

15. The Tribunal is satisfied based on the oral evidence of both the applicant's and the sponsor's mother's that the parties represent themselves to their families as being married to each other. The Tribunal has considered the cards welcoming the arrival of their baby boy as evidence that the opinion of friends and acquaintances that the applicant and sponsor are in a spousal relationship at the time of decision. The Tribunal accepts that given the arrival of their new baby the applicant and sponsor have limited social activities at the time of decision, and their plans revolve around the immediate family. The Tribunal accepts the evidence of the sponsor's mother that the applicant has accompanied the sponsor to family functions and celebrations. The evidence of the social aspects of the relationship at the time of decision is evidence that the applicant and sponsor are in a genuine and continuing relationship, and that they have a mutual commitment to a shared life as husband and wife to the exclusion of all others.
16. The Tribunal is satisfied based on the oral and written evidence before it that the applicant and sponsor have managed the household since 2010. The Tribunal is satisfied that at the time of decision the applicant and sponsor have been assisted in the management of their household and the new arrival of their baby on 10 October 2015 by the applicant's mother who has resided with the couple since 17 June 2015. The Tribunal is satisfied that the applicant and sponsor have discussed and planned that after the applicant's mother leaves this week the applicant will care for the baby every night when he returns from work at about midnight until five or six am allowing the sponsor to sleep, after which time he sleep. The Tribunal is satisfied that the applicant and sponsor assist each other with household chores, depending upon their needs. The evidence of the nature of the household's evidence that at the time of decision the applicant and sponsor are in a genuine and continuing relationship, and that they live together, or not separately and apart, on a permanent basis.
17. The Tribunal is satisfied, based on the evidence of the four witnesses at the hearing, that the applicant and sponsor plan to save to reduce their financial debt, and hope to travel with their baby to Queensland for a holiday and to India to meet the applicant's extended family. The Tribunal is satisfied based on the evidence of the witnesses at the hearing that the applicant and sponsor have been in a committed relationship since their marriage in August 2010 and have provided support to each other during that time. The Tribunal accepts the evidence of the sponsor's mother that the applicant "takes care of" the sponsor. The Tribunal is satisfied based on the evidence before it, that both the applicant and sponsor see the relationship as a long-term one. The evidence of the persons commitment to each other is evidence that the applicant and sponsor are in a genuine and continuing relationship and that they have a mutual commitment to a shared life as husband and wife to the exclusion of all others at the time of decision.
18. Given these findings the Tribunal is satisfied that at the time of this decision the parties are in a spousal relationship. Therefore the applicant meets cl.801.221(2)(c).
19. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.
- 20.
- 21.
- 22.

DECISION

23. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
- cl.801.221(2)(c) of Schedule 2 to the Regulations.

Margie Bourke
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).